

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 192 of 1978

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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CHNADUBHAI BHAVSING

Versus

RAMSINGHBHAI GIBHAIBHAI

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Appearance:

MR RN SHAH for Petitioners

MR MB THAKORE for Respondent No. 1

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CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 01/05/96

ORAL JUDGEMENT

1. The appellants herein are the original defendants and the respondent herein is the original plaintiff and they are referred to as defendants and plaintiff respectively in this judgment. The plaintiff filed Regular Civil Suit No.556 of 1972 for declaration that the plaintiff is entitled to enjoy the suit well till Rs.5,000/- is paid up by defendants and also for injunction restraining the defendants from causing any

obstruction in enjoyment over the suit well and has also claimed for the cost of the suit. The learned 2nd Joint Civil Judge (S.D.), Nadiad by his judgment and order dated 11th July 1977 dismissed the plaintiff's suit with cost. The plaintiff therefore carried the matter in the First Appeal bearing No. Regular Civil Appeal No.181 of 1977 before the learned Joint District Judge, Nadiad, who by his judgment and order dated 23rd February, 1978 reversed the Trial Court's judgment and granted the reliefs in the plaintiff's suit.

2. The facts on which the plaintiff sued may briefly be stated :

The defendants Nos.1 to 4 are the sons of plaintiff's deceased brother Bhavsing. The defendant No.5 is the widow of his brother Bhavsing. The land bearing survey No.672 (new survey No.742) admeasuring 16 Acres situated in the sim of village Dudosra is of his ownership and in his possession for the last several years. There is one well in that land on which the plaintiff has got half undivided share and the defendants jointly have also half undivided share. That well was not in use for several years and therefore, the plaintiff thought to install a water pump over it. Deceased Bhavsing had agreed to accept Rs.150/- from the plaintiff as rent per year. As per the amendment carried out in the plaint, it was agreed that the plaintiff should incur expenses after the suit well and that he would adjust the amount of rent of Rs.150/- per year agreed to be paid to said Bhavsing towards the expenses incurred after the suit well to the extent of Bhavsing's half share. It was further agreed that the plaintiff was entitled to use the suit well exclusively till the debt due from Bhavsing is paid up. Such an agreement was arrived at in the year 1964. In this fashion Bhavsing's half undivided share in the suit well was taken on lease by the plaintiff. According to the plaintiff he spent Rs.10,000/- for repairing of the suit well and thereafter, he got installed the electric motor also.

3. The defendants denied the case of the plaintiff. According to them, the aforesaid land bearing survey No.741 admeasuring 31 acres and 7 gunthas remained undivided between the parties and the defendants had got half undivided share in it. It was jointly purchased by the plaintiff and defendants' father on 25-2-1947 and one year thereafter plaintiff and deceased Bhavsing had installed engine pump over the suit well and that it was run upto 1955. Thereafter, the occupiers were drawing water by Kosh. The plaintiff however, had installed his own

engine over the suit well and neither Bhavsing nor defendants objected to it. It was the case of the defendants that they had given Rs.1,500/- to the plaintiff towards their share of the repairing charges of the well. They have specifically denied the newly introduced case that Bhavsing had given suit well on lease to the plaintiff as alleged. It is further asserted that Bhavsing and defendants used to purchase water at market rate from the plaintiff, however, since the plaintiff refused to supply them water at a critical point of time and thereby started causing damage to them, they tried to install the engine pump on the suit well towards their half share therein. At that time the plaintiff caused obstruction resulting into defendants serving notice dated 28th October, 1972. Having received the notice, the plaintiff rushed to the court praying for the reliefs as stated above.

4. The following issues were framed by the learned Trial Judge at Exh.26 :

1. Whether the plaintiff proves that he is a tenant in 1/2 share of the defts. in the suit well ?

1A Whether the plaintiff proves that he is the tenant of 1/2 share of the defts. in the suit well for a rent of Rs.150/- per year as alleged in para 2?

1B Whether the plaintiff proves the expenses of Rs.10,000/- in repairing suit well as alleged in para 2 ?

1C Whether the plaintiff proves agreement to remain in possession of the suit well till recovery of Rs.5,000/- from the defts. as alleged ?

2. Whether the plaintiff has right to prevent the defts. from installing the electric motor and pump on the suit well ?

3. What reliefs, if any, are available to the plaintiff?

4. What order & decree ?

The learned Trial Judge answered the issues against the plaintiff and dismissed the suit with cost as stated above. He held that the plaintiff failed to prove by reliable evidence the agreement of having taken on lease 1/2 undivided share of the defendant in the suit well at a yearly rent of Rs.150/-; that plaintiff also failed to establish by satisfactory evidence his case about having spent Rs.10,000/- after the suit well in 1964 and that till Rs.5,000/- were discharged, he was entitled to remain in the possession of the whole of the suit well. Taking

into consideration the evidence as a whole, the learned Trial Judge concluded that it was not possible to believe even for a moment that the plaintiff had spent Rs.10,000/after carrying out the repairs of the suit well.

5. The Appellate Court however upon appreciation of the evidence did not agree with the learned Trial Judge. Following points for determination were raised by the learned Appellate Judge.

1. Whether the suit well was repaired by the plaintiff as claimed ?
2. Whether the amount spent on such repair was Rs.10,000/-?
3. Whether the plaintiff is entitled to the declaration and injunction as prayed for ?
4. What order ?

He answered first 3 points for the determination in the affirmative and passed decree for injunction as prayed for in the plaint.

6. When this appeal was admitted, following substantial questions of law are stated to have been involved in the present Second Appeal.

1. Whether the judgment and order and decree of the Lower Appellate Court is contrary to law, against express provision of Statute and against the evidence on record ?
2. Whether the suit as framed is not maintainable at law ?
3. Whether the plaintiff has failed to prove that he is the tenant in 1/2 share of the defendant in the suit well ?

7. I have heard the learned advocates appearing on behalf of the appellants-defendants. I have gone through the pleadings of the parties, notice issued by the defendants to the plaintiff and the evidence placed on the record of the case. It will be interesting to note that the learned Appellate Judge has framed the points for determination which relate to whether the suit well was repaired by the plaintiff and whether the amount spent on such repairs was Rs.10,000/-? The learned Appellate Judge has therefore clearly missed vital point with regard to whether there was an agreement for taking on lease 1/2 share of the defendants' predecessor Bhavsing by the plaintiff. It is in the background of this

aspect of the matter that the findings of the learned Appellate Judge may be examined. The learned Appellate Judge has proceeded on what the defendants have said in their written statement (para-5,)Exh.18.The defendants have asserted in their written statement that the plaintiff was permitted by their predecessor to carry out the repairs on the well and to install a water pump on the suit well. But according to the defendants,a sum of Rs.1,500/- was contributed by their predecessor towards the repairs.The learned Appellate Judge has however,taken one part of the admission for basing his conclusion. With regard to point No.2,the learned Appellate Judge has referred to the actual installation of the pump on the suit well and also the installation of pipeline of the length of 1.1/2 miles.Referring to the case of the defendants that they were purchasing water at ordinary market rate from the plaintiff and that they had to issue notice dtd.28-10-72 calling upon the plaintiff to open 1/2 portion of the suit well to enable them to install the water pump of their own,the learned Appellate Judge has come to the conclusion that the plaintiff was in possession of the entire well.However,it clearly appears that the learned Appellate Judge appears to have missed the case of the defendants that the plaintiff had installed the water pump and therefore,it was obvious for them to purchase water along with the other persons and that by itself would not show that 1/2 undivided share in the suit well was let out by their predecessor to the plaintiff.According to the defendants,the learned Appellate Judge has failed to appreciate the evidence about the actual amount spent towards the repairs of the well. The plaintiff did not produce any accounts.The plaintiff did not set out any particulars of the expenses incurred.It was only in the oral evidence. The learned Appellate Judge,on appreciation of the evidence,came to the conclusion that a sum of Rs.10,000/was spent by him towards the repairs of the suit well and/or installation of the pump on the suit well.Thus,the learned Appellate Judge held first two points in favour of the plaintiff and on facts affirmatively held point No.3.However,it appears that the question of law as to whether the plaintiff would be entitled to the reliefs of declaration and injunction does not appear to have been canvassed before the Appellate Court and the same is sought to be canvassed before this court.

8. I have heard the learned advocate appearing for the plaintiff. Inspite of the fact that this matter is being called out from time to time no one has remained present on behalf of the plaintiff(respondent herein). Having heard the learned advocate for the defendants,I am now

required to proceed with this judgment. On first question of law, it has been submitted that the plaintiff would not be entitled to the reliefs in the suit by virtue of the relevant provisions of The Specific Relief Act (herein referred to as "The Act"). Reference has been made to Section 10, Section 34, Section 38 and Section 41 of the Act. Section 38 of the Act says that subject to the other provisions contained in or referred to in the Chapter (Chapter No. VIII) a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication and that when any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter-II. Sub section 3 of Section 38 reads as under:

"When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual

injunction in the following cases, namely:-

- (a) where the defendant is trustee of the property for the plaintiff;
- (b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;
- (c) where the invasion is such that compensation in money would not afford adequate relief;
- (d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

From the above quoted provisions, it clearly appears that the equitable relief of perpetual injunction would be available where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion or where invasion is such that compensation in money would not afford adequate relief. In the present case the substance of the plaintiff's suit is that there was an agreement that till the half share of the expenses, amounting to Rs.5,000/- was paid up by way of yearly rent of Rs.150/-, the plaintiff would remain in possession of the suit well, by virtue of 1/2 share in the suit well being his own share and 1/2 share of the suit well being the share of the defendants. It is therefore, clear on the averments made by the plaintiff in the plaint that his claim was clearly ascertainable in terms of money. He could have prayed for a consequential relief or a substantial relief of payment of remaining amount of the defendants' share of the expenses incurred by him. In the background of such a state of the plaintiff's frame of the suit, the provisions contained in Chapter-II referred to in Section 38 of the Act might

be noticed. Reference has been made to Section 10 from the said Chapter. Section 10 provides that specific performance of any contract may, in the discretion of the court, be enforced-

(a) when there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done; or

(b) when the act agreed to be done is such that compensation in money for its non-performance would not afford adequate relief.

9. It can thus be seen even in Section 10 that equitable relief of specific performance of a contract could not be granted in case plaintiff could claim actual damage or compensation in terms of money which according to the substance of the plaintiff's suit was the real cause for the plaintiff.

10. Reference has then be made to Section 34 of the Act which speaks about the relief of declaration. According to Section 34, the court may in its discretion make a declaration with regard to the plaintiff's title or legal character or right as to his property provided that the plaintiff being able to seek further relief than merely a title or declaration and omits to do so, no such relief of declaration should be granted. Even according to this provision availability of an adequate relief not claimed by the plaintiff disentitles the plaintiff to have declaration with regard to his right to property. Finally, Section 41 of the Act has been referred to by the learned advocate for the defendants. Section 41 says that an injunction cannot be granted in respect of the enumerated cases in Clause A to J and Clause (h) speaks about the case when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust.

11. On going through the averments contained in the plaint and considering the substance of the plaintiff's case, it clearly appears that the basic transaction between the plaintiff and the deceased predecessor of the defendants was that of advance of Rs.5,000/- in the form of plaintiff having incurred expenses for the repair of the suit well. Such an advance amount was to be paid up by way of yearly rent of Rs.150/- commencing from the year 1964. The plaintiff has not set out what is the amount outstanding on the date of the suit which the plaintiff could have done so without any difficulty. It is not in dispute that the suit well is of the joint ownership of the plaintiff and defendants. In the background of such facts, it is clear that the substance

of the suit is for recovery of the balance amount towards the amount of Rs.5,000/-spent by the plaintiff towards the share of the defendants' predecessor and thereafter,the defendants.That being the substance of the plaintiff's suit, it is clear that the plaintiff could have claimed relief in terms of money.The plaintiff having not done so, it is obvious,the plaintiff would not be entitled to the equitable relief prayed for in the suit. This would be the legal position,despite the plaintiff having established the plaintiff's case with regard to incurring expenses of Rs.5,000/- towards the share of the defendants.This would be so despite plaintiff can be said to have established the plaintiff's case with regard to giving on lease defendants' 1/2 share at the yearly rent of Rs.150/-. The result is that the plaintiff would not be entitled to the relief prayed for in the suit; even otherwise by this point of time,the amount of Rs..5,000/would have exhausted by way of adjustment of Rs.150/- per year as rent of 1/2 share of the defendants in the suit well. I,therefore,answer first question of law in the affirmative. Rest of the two questions for determination would not arise. However,in so far as second question of law is concerned,the same is relatable to the first question of law and same would be answered in the affirmative.In so far as third question of law is concerned,it may be seen from the judgment of the Appellate Court that the Appellate Court has severed the averments made by the defendants in their written statement. It appears,that part of admission has been relied upon for the purpose of appreciation of evidence adduced in the case.It is not that in this second appeal the evidence is required to be appreciated afresh.What is required to be seen is whether the plaintiff has come out with specific particulars of he having taken on lease 1/2 share of the defendants in the suit well ? On going through the plaint it does appear that the case of taking on lease the 1/2 share of the defendants has been subsequently introduced.The evidence with regard to repairing of the suit well,incurring of expenses,installation of pump and pipeline has been relied upon by the plaintiff for proving the agreement with regard to taking on lease the 1/2 share of the defendants in the suit well.There is no independent evidence on material to establish such an agreement.In the absence of any material on this question,it has to be found that the learned appellate judge has erred in law in coming to the conclusion that the evidence on the first two points raised by him has resulted in establishing the plaintiff's case of lease as stated above.



12. In the result, defendants-appellants herein would succeed in this Second Appeal. The appeal accordingly is hereby allowed. The judgment and decree of the learned trial judge dismissing plaintiff's suit is restored by setting aside the judgment and decree passed by the appellate court. However, there shall be no order as to cost all throughout.

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